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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-318

DALLAS POWER & LIGHT COMPANY, TEXAS ELECTRIC SERVICE COMPANY, TEXAS POWER & LIGHT COMPANY,

Petitioners,

v.

CENTRAL POWER & LIGHT COMPANY, PUBLIC SERVICE COMPANY OF OKLAHOMA, SOUTHWESTERN ELECTRIC POWER COMPANY, WEST TEXAS UTILITIES COMPANY, CITY OF ALTUS, OKLAHOMA, CITY OF FREDERICK, OKLAHOMA, CITY OF CORDELL, OKLAHOMA, CITY OF MANNFORD, OKLAHOMA, VERDIGREE VALLEY ELECTRIC COOPERATIVE, INC., INDIAN ELECTRIC COOPERATIVE, INC., MUNICIPAL ELECTRIC SYSTEMS OF OKLAHOMA, ARKANSAS ELECTRIC COOPERATIVE CORPORATION, FEDERAL ENERGY REGULATORY COMMISSION, HOUSTON LIGHTING & POWER COMPANY, CITY OF SAN ANTONIO, LOWER COLORADO RIVER AUTHORITY,

Respondents.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Reply Brief of Dallas Power & Light Company, Texas Electric Service Company, and Texas Power & Light Company

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INTRODUCTION

Petitioners Dallas Power & Light Company (DP&L), Texas Electric Service Company (TESCO), and Texas Power & Light Company (TPL), the operating subsidiaries of Texas Utilities Company (TU), are submitting

this Reply Brief in response to certain arguments advanced by Respondents Central Power & Light Company (CP&L), Public Service Company of Oklahoma (PSO), Southwestern Electric Power Company (SWEPCO), and West Texas Utilities (WTU), the operating subsidiaries of Central and South West Corporation (CSW), in their Brief Opposing Certiorari, filed with the Court on September 26, 1978.

ARGUMENT

This Court's decision in *Connecticut Light & Power Company* v. *FPC* precludes any determination that the TU companies are subject to the jurisdiction of the Federal Energy Regulatory Commission under the Federal Power Act.

As explained in the Petition for a Writ of Certiorari (pp. 14-15), the TU companies were suseptible to a claim of jurisdiction under the Federal Power Act only during a ten-hour period on May 4, 1976, during which time they were involuntarily interconnected with electrical systems which directly or indirectly transmitted or sold electric energy in interstate commerce. All interconnections of the TU companies with WTU and others engaged in the sale or transmission of electric energy in interstate commerce were opened by 3:43 p.m., May 4, 1976, at which time the operations of the TU companies were once again confined solely to Texas. Moreover, the undisputed evidence clearly establishes that at all times after 3:43 p.m., May 4, 1976, the TU companies have operated electrically isolated from all systems susceptible to the jurisdiction of the Federal Energy Regulatory Commission under the Act. In view of these facts, this Court's decision in *Connecticut Light & Power Company* v. *FPC*, 324 U.S. 515 (1945),

requires a determination that the TU companies are not subject to the jurisdiction of the Commission.

In *Connecticut*, the Court recognized that the test of jurisdiction must be measured from facts which exist at the time the agency asserts jurisdiction. 324 U.S. at 531. Because the operations of the TU companies are now and since May 4, 1976 have been confined to Texas, the TU companies are not susceptible to classification as public utilities under the Federal Power Act, subject to the jurisdiction of the Federal Energy Regulatory Commission.

The CSW companies' response (Brief Opposing Certiorari, pp. 18-19) to this argument is perfunctory at best, consisting only of assertions, unsupported by reference to facts of law, that Petitioners' argument is frivolous and irrelevant. Significantly, the CSW companies do not challenge the validity of Petitioners' analysis of the *Connecticut* decision. Instead, they assert that *Connecticut* is inapplicable to the instant case because it concerns the withdrawal from interstate commerce of a single company only. The CSW companies allege that the TU companies have removed themselves from interstate commerce through the concerted implementation of a long-standing conspiracy violative of the antitrust laws. (Brief Opposing Certiorari, p. 18) This position is at odds both with decisions by this Court and with the facts of the case. The TU companies could in no event be subject to jurisdiction under Part II of the Federal Power Act once any interstate flow of electric energy ceased. Consequently, consideration of alleged anticompetitive practices is totally irrelevant to the Commission's and the Court of Appeals' decisional process, there being no requisite jurisdictional facts.

Consideration of anticompetitive matters is within the regulatory mandate of the Commission only when the

company involved already is a "public utility" under the Act and there is a nexus between the alleged anticompetitive practices of the public utility and the regulatory jurisdiction of the Commission. *City of Lafayette, Louisiana* v. *SEC*, 134 U.S. App. D.C. 229, 454 F.2d 941, 955 (1971), *aff'd sub nom., Gulf States Utilities Co.* v. *FPC*, 411 U.S. 747 (1973).

In *City of Lafayette*, certain cities had petitioned for review of orders of the Federal Power Commission (FPC), Securities and Exchange Commission (SEC) approving applications by two electric utilities (Gulf States Utilities Company before the FPC and Louisiana Power & Light Company, before the SEC) proposing issuance of bonds, notes and stock, on the grounds that the agencies failed to take proper account of the cities' claims that the proceeds would be used to advance an unlawful conspiracy by the two utilities to suppress competition. The United States Court of Appeals for the District of Columbia Circuit affirmed the SEC order because the SEC had no regulatory jurisdiction over the operations of Louisiana Power & Light Company. 454 F.2d at 955. Since the FPC had regulatory jurisdiction over Gulf States Utilities Company, because of its undisputed status as a "public utility" under the Federal Power Act, the Court of Appeals ordered the FPC to conduct further proceedings with respect to the anticompetitive allegations. 454 F.2d at 949.

The decision of the Court of Appeals was affirmed by this Court in *Gulf States Utilities Company* v. *FPC*, 411 U.S. 747 (1973). This Court accepted the reasoning of the Court of Appeals that the agency must have specific regulatory authority over a utility before it could inquire into anticompetitive allegations:

> . . . [T]he general doctrine requiring any agency to take account of antitrust considerations does not extend to a case like the one before us where the antitrust problem arises out of operations of the regulated company (past and projected) and the agency, here the SEC, has not been given any regulatory jurisdiction over operations of the company. The SEC has no jurisdiction over operations and stands in a different posture from the FPC which, as we have already noted, has regulatory jurisdiction over operations in view of its authority, *inter alia*, to direct utilities to interconnect on reasonable terms, or to prohibit a utility from discriminating in rates and facilities against its municipal customers. 411 U.S. at 754.

In sustaining the lower court's holding, this Court found that the regulatory power of the FPC over the operations of the interstate public utility business carried with it a responsibility to consider the anticompetitive effects of regulated aspects of interstate utility operations. The Commission's responsibilities in this regard, however, were carefully tied by the Court to directives contained in specific sections of the Federal Power Act. 411 U.S. at 758-759. Unless the Commission first possesses regulatory authority over utility operations, then it has no authority to consider allegations of anticompetitive conduct.

Having confined their operations to the State of Texas, the TU companies are not susceptible to the regulatory jurisdiction of the FERC. Consequently, the Commission had no duty, indeed had no authority, to consider anticompetitive contentions. The Commission correctly rejected the attempt by the CSW companies to "bootstrap" the jurisdictional status of the TU companies on the basis of anticompetitive allegations.

The actions taken by the TU companies to limit their system to intrastate operations are consistent with the regulatory scheme authorized by Congress in the Federal

Power Act. The Act specifically recognizes the existence and authority of state regulatory commissions and the limitations of federal authority:

> . . . such Federal regulation, however, to extend only to matters which are not subject to regulation by the States. (49 Stat. 847, 16 U.S.C. §824(a))

Moreover, unlike the Natural Gas Act which in Section 7(b) prohibits the abandonment of any service without approval of the Commission, the Federal Power Act is silent on this subject.

The right of an electric utility to structure its operations to remove itself from the ambit of the Commission's jurisdiction was specifically recognized by this Court in *Connecticut Light & Power*. 324 U.S. at 517-519. This right is not contested by the CSW companies. Rather, they fill their Brief Opposing Certiorari with unspecific and unproven claims of anticompetitive activity, illegal disconnections and actions against the public interest by the TU companies. These allegations are irrelevant to the narrow jurisdictional issue before the Court. Such charges of violations of the antitrust laws are merely an attempt to circumvent the plain meaning of *Connecticut* so as to induce the Commission into asserting jurisdiction over the TU companies and thus to preserve the corporate structure of CSW. The Commission properly refused this gambit, and this Court should direct the Court of Appeals to sustain the Commission's decision.

In its opinion, the Court of Appeals failed to reach the merits of the jurisdictional question before it and instead chose to remand that question to the Commission. The decision by the Court of Appeals contravenes the recent holding of this Court in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 98 S.Ct.

1197 (1978). In the *Vermont Yankee* case, this Court criticized the remand of orders of the Atomic Energy Commission by the Court of Appeals for the District of Columbia Circuit as an intrusion by the court into the administrative process. 98 S.Ct. at 1218. Administrative decisions, the Court held, should be set aside only for substantial procedural or substantive reasons as mandated by statute. 98 S.Ct. at 1219. Yet, in the instant case, the Court of Appeals would require the Commission to conduct hearings or otherwise augment the record of a proceeding which can have but one result: a finding that the TU companies are not susceptible to jurisdiction under the Federal Power Act. The dictating of such useless administrative procedures by the Court of Appeals is precisely the matter which this Court addressed, and rejected, in *Vermont Yankee*. The interest in dispensing with such unnecessary but costly proceedings is not confined to the TU companies but is an interest of national importance as this Court indicated in *Vermont Yankee*. Here, too, the Court should reverse the decision to remand by the Court of Appeals, and should direct it to uphold the Commission's determination of the jurisdictional issue.

CONCLUSION

For these reasons and for those presented in the Petition for Certiorari, Dallas Power & Light Company, Texas Electric Service Company and Texas Power & Light Company pray that this Court grant the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit, that this Court reverse the decision of the Court of Appeals and that this Court direct the Court of Appeals to sustain the Commission's determination that it is without jurisdiction over the TU companies as a matter of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 18th day of October, 1978, served a copy of this Reply Brief, herein by mailing three copies thereof, together with a copy of this Certificate, postage prepaid, to counsel for all parties of record as follows:

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